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No. 88-78

IN THE

Supreme Court of the United States

October Term, 1988

JANE DOE, by her Parent and Natural Guardian, JOHN DOE,
Petitioner,

against

THOMAS SOBOL, as Commissioner of the New York State Education Department,
Respondent.

DOL #85041167

Brief for Respondent in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Dated: September 2, 1988

Question Presented for Review

Whether the Second Circuit was correct in holding that the district court exceeded its authority under the Education of the Handicapped Act ("EHA"), 20 U.S.C. § 1413(a)(4)(B)(ii), in ordering the New York State Commissioner of Education to effectuate Jane Doe's placement at a private school which had not been on the Commissioner's list of approved schools at the time that either the Buffalo Committee on the Handicapped, the local hearing officer, or the district court ordered her placement there.

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DOL # 85041167

Brief for Respondent in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Citations to Decisions Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 838 F.2d 635 (2d Cir. 1988) (Pet App, pp 1a-13a). The published opinions of the United States District Court for the Western District of New York are reported at 621 F.Supp. 975 (W.D.N.Y. 1985), 638 F.Supp. 1564 (W.D.N.Y. 1986), and 653 F.Supp. 1405 (W.D.N.Y. 1987) (Pet App, pp 16a-43a).

Statutes and Regulations Involved

The statutes and regulations involved are the Education of the Handicapped Act ("EHA"), 20 U.S.C. § 1400 *et seq.*, 34 C.F.R. Part 300, New York Education Law §§ 4401 *et seq.*, 4407, and 8 N.Y.C.R.R. Part 200. Some of the pertinent provisions are reproduced in the appendix to the petitioner's brief (Pet App, pp 47a-58a).

Statement of the Case

Dr. John Doe, parent and natural guardian of Jane Doe, initiated this action under the EHA to mandate his daughter's placement at public expense and to obtain reimbursement for her institutionalization at Hedges Treatment Center, an out-of-state psychiatric treatment center which had been closed to new admissions from New York, where Dr. Doe had placed her unilaterally prior to exhausting his administrative remedies under the EHA.[1] Stripped to its essence, Dr. Doe sought to mandate the

[1]Hedges Treatment Center is a dual purpose institution, providing psychiatric hospitalization, as well as residential educational placements for children who suffer educational handicaps. Jane Doe never received her education at Hedges Treatment Center which was geared to older children. Instead, she obtained her education at the Devereaux Day School, an unapproved day school which is a separate institution from Hedges Treatment Center.

Commissioner to provide educational funding for what in Dr. Doe's view was the best care in the nation for the treatment of his daughter's restrictive anorexia.

The Second Circuit unanimously reversed the judgment of the district court which had ordered the Commissioner (1) to effectuate Jane Doe's placement at Hedges Treatment Center and the Devereaux Day School at no expense to petitioner, and (2) to reimburse Dr. Doe for Jane Doe's institutionalization from May 15, 1985 until the Commissioner effectuated the placement, which was determined to be $69,700.00 plus costs and interest from the date of entry of judgment. 838 F.2d 635 (2d Cir. 1988) (Pet App, pp 1a-13a), *revg* 653 F.Supp. 1405 (W.D.N.Y. 1987) (Pet App, pp 16a-43a). The Second Circuit held that the district court exceeded its authority under the EHA to compel Jane Doe's placement at an unapproved out-of-state facility because the EHA itself requires that handicapped children be educated at public expense only in those private schools that meet state educational standards and therefore have been approved specifically prior to placement. 838 F.2d at 640-641.

Facts

Jane Doe is an extremely bright girl with an I.Q. of 143 who was diagnosed as having anorexia nervosa in 1983 at the end of fourth grade. 838 F.2d at 636. From 1983 through 1985, she was hospitalized at Strong Memorial Hospital in Rochester, New York three times because she lost so much weight that she was in a life-threatening situation. *Id.* She attended private school intermittently during the 1983-1984 school year but nonetheless passed all her courses. Eventually, her parents arranged for a private tutor who came to the hospital. Her achievement scores throughout this period far exceeded her chronological grade level.

In November of 1984, Dr. and Mrs. Doe requested that Jane be evaluated for special education and indicated that the treatment team at Strong Memorial Hospital recommended placement at Hedges Treatment Center. At the time, Hedges was an accredited psychiatric hospital but was not even approved as a school in Pennsylvania. The Buffalo School District's Committee on the Handicapped ("COH") voted unanimously not to classify Jane as educationally handicapped.

Subsequently, upon a requested reconsideration, the COH determined that Jane needed special education for educational reasons. 838 F.2d at 637. The psychiatrist at Hedges Treatment Center submitted a psychiatric evaluation, as did another psychiatrist who recommended that Jane be accepted at Hedges. Jane's individualized education plan ("IEP") detailed Jane's psychological problems and behavioral goals, and called for psychological services, nutritional counselling, and recreation. However, no specific educational goals were recommended other than completing sixth grade.

Following Jane's rejection from six in-state residential programs, the COH submitted an application to the regional associate from the State Education Department to approve a contract with the Devereaux Foundation's Hedges Treatment Center on Jane's behalf. 838 F. 2d at 637.[2]

In order to fulfill its obligations under the EHA, the State Education Department has created the Office for the Education of Children with Handicapping Conditions, through the Division of Program Monitoring. 838

[2]There was no mention of schooling to occur at a day school or an indication that the COH knew anything about the Devereaux Day School where Jane eventually received her education.

F. 2d at 640 (Pet App, p 10a). This office includes regional associates who review recommendations for private placement. The office maintains a list of "approved" schools of private and out-of-state schools eligible to contract for the education of handicapped students from New York. *Id.* Out-of-state schools must seek approval by application to the State Education Department and the division monitors out-of-state schools for compliance with New York's standards and approves placements at such schools recommended at the local level. *Id.*

Here, the regional associate advised the COH that Hedges Treatment Center was closed to new admissions from New York State. 838 F.2d at 637. The State Education Department had closed Hedges Treatment Center for new admissions because while it was a certified psychiatric hospital in Pennsylvania, it was not licensed as a school there. In addition, the State Education Department had serious concerns about the use of seclusion rooms and the requirement under Pennsylvania law that children over 14 years of age could sign themselves out in certain circumstances. After the regional associate advised the COH that Hedges Treatment Center was not an approved placement, the COH took no further action.

Procedural History

When Dr. Doe was advised that his daughter no longer needed acute medical care at Strong and she would be discharged, he instituted suit against the Commissioner of Education, as well as Strong Memorial Hospital. 838 F.2d at 637. Prior to the case being transferred from Rochester to Buffalo, Judge Telesca declined to issue a preliminary injunction. Dr. Doe subsequently withdrew the lawsuit against Strong Memorial Hospital and unilaterally placed Jane at Hedges Treatment Center. *Id.* Dr. Doe then

sought a preliminary injunction to obtain Jane's immediate placement at Hedges Treatment Center and Devereaux Day School at public expense. *Id.*

The district court denied plaintiff's request for preliminary injunction on November 4, 1985. 621 F.Supp. 975 (W.D.N.Y. 1985). Judge Curtin found that Jane had not exhausted state administrative remedies first as the EHA requires and ordered Dr. Doe to pursue the State administrative process. *Id.*

Petitioner sought a hearing through the Board of Education, as required by Education Law § 4404(1), and an independent hearing officer was appointed to hear petitioner's case. 838 F.2d at 637. However, there was no adversarial hearing before the hearing officer. Petitioner submitted no documents or exhibits. Rather, the school district and Dr. Doe stipulated that Jane's classification was educationally handicapped/emotionally disturbed and that the recommendation of residential placement at the Hedges Treatment Center was correct. *Id.* Both parties asserted that the sole issue was the implementation of such recommendation. Based on the stipulation, the hearing officer ordered Jane's immediate placement at Hedges conceding that:

> "[o]rdinarily, a hearing officer does not have authority to order placement of a child at a residential educational program that is not currently on State Education Department's list of approved residential placements". 638 F.Supp. 1564, 1566 (W.D.N.Y. 1986).

The regional associate of the State Education Department did not implement the hearing officer's recommendation because while the overall problems with Hedges

Treatment Center had been resolved, Hedges was not approved for children of Jane Doe's age group and the Devereaux Day School where she was receiving her education had never even submitted an application for New York State approval. 838 F.2d at 637.

Petitioner then renewed his motion for a preliminary injunction which was deferred pending the Commissioner's review of the hearing officer's decision. *Id.* Although Judge Curtin held that petitioner had exhausted sufficiently his administrative remedies because he was not aggrieved by the hearing officer's decision, nonetheless the court concluded that review by the Commissioner was appropriate because the State Education Department must approve out-of-state residential placements and placements must be made only at institutions approved by the Commissioner.

Neither the school district nor Dr. Doe addressed the merits of Jane Doe's case before the Commissioner, asserting only that the Commissioner had no jurisdiction to review the hearing officer's determination. The Commissioner required the school district to submit the record of proceedings before the COH. Based on the record before him, the Commissioner issued a decision concluding that the record did not support the determination that Jane Doe had an educational handicap. He observed that the COH recommendation of Hedges Treatment Center contained no discussion as to the content of the educational program to be furnished or the substantive goals of the educational program. Absent such documentation, the Commissioner concluded that the recommendation of Hedges Treatment Center met Jane's medical as opposed to any educational needs and that there was no indication in the record that she had an educational handicap.

Following the Commissioner's determination, petitioner moved for partial or full summary judgment arguing that the Commissioner's decision was a nullity. 638 F.Supp. 1564 (W.D.N.Y. 1986). The district court granted partial summary judgment holding that the hearing officer's determinations that Jane was educationally handicapped and that her Phase I IEP be approved to the extent that it provided for special education and related services were final. 638 F.Supp. at 1564, 1570-1572. Since the Commissioner did not address the approval status of Hedges Treatment Center and the Devereaux Day School, the court treated the Commissioner's decision as a nullity. *Id.*

However, the court held that the Commissioner could not be required to pay for services not covered by the EHA and directed the parties to present evidence at trial concerning (1) the nature of the services Jane needs and those she is receiving, (2) the approval status of Hedges Treatment Center, (3) its suitability to meet Jane's needs, and (4) the possibility of any alternative placement. 638 F.Supp. at 1572.

Following a nonjury trial, the court found that Jane Doe was entitled to be placed at Hedges Treatment Center at the Commissioner's expense and ordered her immediate placement there. 653 F.Supp. 1405, 1406-1407, 1412, 1417 (W.D.N.Y. 1987). The court held that the limited approval of Hedges Treatment Center and the total lack of approval of the Devereaux Day School did not preclude it from ordering Jane's placement there. 653 F.Supp. at 1415. The court also granted petitioner reimbursement for Jane's tuition from the date she was unilaterally placed at Hedges to the date of the decision over respondent's objection that the court lacked jurisdiction to award retroactive monetary relief under the Eleventh Amendment.

Jane Doe was discharged from Hedges Treatment Center prior to the oral argument in the Second Circuit. She is currently enrolled at a private school in Buffalo, which is not a special education placement under the EHA.

Subsequent to the argument, the Second Circuit wrote to counsel asking them to submit letters addressing the issue of whether the appeal was moot. 838 F.2d at 638 n 1. The Commissioner took the view that Jane Doe's claims for injunctive and declaratory relief were moot because Jane Doe had been discharged and it was pure speculation as to whether Jane Doe would ever need special education again. The Commissioner contended that the only live controversy related to monetary reimbursement against the State which is barred by the Eleventh Amendment.

The Second Circuit did not reach petitioner's claims for injunctive, declaratory or monetary relief, finding it unnecessary to determine whether the relief sought by petitioner had been mooted. 838 F.2d at 638 n 1 (Pet App, p 6a).

Rather, the Second Circuit reversed the district court and held that neither the State Education Department, the Buffalo School Board nor the local hearing officer could place Jane Doe in an unapproved private school without violating the EHA's requirement that handicapped children be educated at public expense only in private schools that meet state educational standards. 838 F.2d at 640 (Pet App, p 10a). Since there were restrictions on admissions to Hedges Treatment Center and the Commissioner had not approved the contract with Hedges, and Devereaux Day School had never even sought approval from the State Education Department, the Second Circuit held that the district court exceeded its authority under 20 U.S.C. § 1415(e)(2) to grant appropriate relief under the EHA. 838 F.2d at 640-641 (Pet App, p 11a).

ARGUMENT

The decision below is not in conflict with prior holdings of this court or other circuit courts and properly interprets the EHA.

A.

There is no merit to petitioner's contention (Pet, pp 10-14) that the decision below is in conflict with *Burlington School Committee v. Department of Education of the Commonwealth of Massachusetts,* 471 U.S. 359 (1985), or other Court of Appeals decisions which interpret the ambit of a district court's authority to provide "appropriate" relief under the EHA.

The broad language of *Burlington* upon which petitioner relies must be examined in the context of that case. While the *Burlington* Court held that "appropriate" relief includes retroactive reimbursement to parents as an available remedy in a proper case, the private school placement at issue in *Burlington* was a *state approved* private school in Massachusetts. 471 U.S. at 362. Moreover, in *Burlington* the child's placement at an approved private school had been found to be appropriate by the Massachusetts Department of Education's Bureau of Special Education Appeals following a hearing. 471 U.S. at 362-363. Thus, while this Court upheld the power of the district court to order school authorities to reimburse parents for their expenditures for private special education if the court ultimately determines that the private placement rather than the proposed IEP is proper, it did not hold that a district court has authority to reimburse parents for private school education which does not meet state educational standards as required by the EHA.

Petitioner's related contention that the Second Circuit has, contrary to the teachings of *Burlington,* unduly restricted a district court's ability to grant appropriate relief in EHA cases is unwarranted. Dr. Doe urges that the overriding purpose of the EHA is to provide a free appropriate public education and that district courts should be afforded broad enough discretion to order placement at unapproved private schools (Pet, pp 11-12). However, as the Second Circuit correctly noted, the EHA requires that handicapped children be provided appropriate public education consisting of special education and related services that meet the standards of the state educational agency (§ 1401[18][b]). While free public education may be provided in private schools and facilities upon referral from state or local educational agencies (§ 1413[a][4][B][i]), in all such instances the state educational agency "shall determine whether such schools and facilities meet standards that apply to state and local education agencies" (§ 1413[a][4][B][ii]).

The EHA must be read as a whole and each provision must be read in context. Petitioner's view gives insufficient deference to the role of the state educational agency in implementing the goals of the EHA. The state educational agency has broad oversight responsibilities under the EHA. As noted above, the state educational agency must ensure that the education provided at public and private schools in and out of the state meet state standards, as well as those of the EHA. 20 U.S.C. § 1412(E)(6), 34 C.F.R. § 300.347. By definition, Congress has provided that a "free appropriate education" consists of special education and related supervision which "meet the standards of the State educational agency". 20 U.S.C. § 1401(18). The State educational agency is further enjoined to assure

> "that the requirements of this [Act] are carried out and that *all* educational programs for handicapped children within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and *shall meet education standards of the State educational agency*" (emphasis added). 20 U.S.C. § 1412(6).

The state educational agency is specifically required to review out-of-state placements (20 U.S.C. § 1413[a][4]), and must ensure that local educational agencies properly develop and implement IEPs. *See* 34 C.F.R. § 300.341. The state must also recover funds from local educational agencies for erroneous classifications. 20 U.S.C. § 1413(a)(5). Thus, as a practical matter, state overview is essential to ensure compliance with state educational standards as well as the requirements of the EHA. The requirement that private schools must meet the standards of the state education agency reflects Congress' realization that states have traditionally formulated and executed educational policy. *See Board of Education v Rowley,* 458 U.S. 176 (1982).

The Second Circuit's decision reaches a reasonable balance between the remedial powers of a district court and state educational agencies' obligation to ensure that private schools used to provide free appropriate education under the EHA meet state and federal standards. Contrary to petitioner's allegation, the Second Circuit's decision does not allow states to exclude severely handicapped children from educational services without redress (Pet, pp 22-24). Here, there was no showing that the State Education Department's determination to close and/or limit

admissions to Hedges Treatment Center was unreasonable. Rather the testimony at trial established that the state had legitimate concerns in closing and then limiting admissions to Hedges Treatment Center. The EHA does not require states to use private schools, but if they do so, the private schools must be monitored. That New York State requires schools to obtain approval before placing children there pursuant to the EHA is patently reasonable and necessary.

None of the Court of Appeals decisions relied upon by petitioner (Pet, pp 12-14), which have held that the authority found in section 1415(e)(2) to fashion appropriate relief encompasses a broad grant of equitable power, are in conflict with the decision below. The facts of these cases are distinguishable and reference to the general language of these cases provides no basis for simply ignoring the State educational standards involved here.

B.

Nor is the Second Circuit's decision in conflict with this Court's decisions in *Board of Education v. Rowley,* 458 U.S. 176 (1982), and *Irving Independent School District v. Tatro,* 468 U.S. 883 (1984), and cited Court of Appeals decisions as claimed by petitioner.

In *Rowley,* this Court refused to impose a substantive educational standard upon the states and refused to require that a deaf child who was achieving passing grades be provided an interpreter. While the Court recognized that the education must be sufficient to confer some educational benefit upon the handicapped child (458 U.S. at 200-201), it rejected arguments that states must maximize each child's potential. 458 U.S. at 203-204. Significantly, the *Rowley* Court noted that the education provided to handicapped children "must meet the State's educational

standards". 458 U.S. at 203. This Court did reject the Board of Education's argument that courts were given only limited authority to determine whether the local educational agency had complied with the procedural requirements of the State Plan and had no power to review the substance of the state program. However, this Court was also sensitive to the limits on judicial review. Specifically, while a district court was to base its decision on the preponderance of the evidence, this Court held that the Act is not an

> "invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review". 458 U.S. at 206.

Moreover, "due weight" was to be given state administrative proceedings. *Id.* Courts were enjoined to "be careful to avoid imposing their view of preferable educational methods upon the States". 458 U.S. at 207. This Court concluded that the EHA did not alter the fact that the primary responsibility for formulating education is to be left to state and local authorities and that Congress did not intend to displace the primacy of the states in education. 458 U.S. at 207-208.

In *Tatro,* this Court held that for Amber Tatro clean intermittent catheterization ("CIC") was a "supportive service * * * required to assist a handicapped child to benefit from special education" because Amber could not attend school without CIC.[3] 468 U.S. at 890-891. This

[3]We note that in *Tatro* plaintiffs had exhausted fully the administrative procedures mandated by the EHA. Both the hearing officer and the Texas Commissioner of Education held that the school was required to provide CIC. However, the Texas State Board of Education reversed, holding that CIC was not a related service under the EHA.

Court further held that CIC was excluded from the definition of "medical servic[e] serving purposes other than diagnosis or evaluation because it was not provided by a licensed physician", based on 34 C.F.R. 300.13(a), (b)(4), (b)(l0). 468 U.S. at 891-895.

As in *Rowley,* the local educational agency—not the Texas State Commissioner of Education—had argued that courts should be limited to inquiring whether a school district has followed the requirements of the State Plan and has followed the Act's procedural requirements. 468 U.S. at 890. This Court noted that in *Rowley, supra,* 458 U.S. 176, 206 n 27 (1982), it had held that a court must determine whether an IEP has been created for the child in question and not merely whether the school district followed the State Plan and procedure. *Id.* The *Tatro* Court stated that judicial review was also appropriate to address the legal question of whether the school district had met its substantive obligation under the "related services" requirement of section 1401(17). *Id.*

Petitioner asserts, as the predicate for the alleged conflict with *Rowley* and *Tatro,* that the Second Circuit held that a district court is without jurisdiction to review a state policy, plan or law which purportedly prevents a handicapped child from receiving a free appropriate education under the EHA. In arguing that the Second Circuit so held petitioner ignores the facts and the unique procedural history of this case, as well as the court's holding. Here, the Commissioner has never argued, and the Second Circuit did not hold that the Commissioner's actions vis-a-vis approving private placements are not subject to review or that conformity to the State Plan and state procedures are the sole inquiries properly before the court. Accordingly, there is no conflict between the Second Circuit decision and *Tatro* and *Rowley.*

Thus, this case is also distinguishable from *Battle v. Commonwealth of Pennsylvania,* 629 F.2d 269 (3d Cir. 1980), *cert. den. sub nom. Scanlon v. Battle,* 452 U.S. 968 (1981); *Crawford v. Pittman,* 708 F.2d 1028 (5th Cir. 1983); *Georgia ARC v. McDaniel,* 716 F.2d 1565 (11th Cir. 1983), *judgment vacated and remanded on other grnds, McDaniel v. Georgia ARC,* 468 U.S. 1213 (1984); *Parks v. Pavkovic,* 753 F.2d 1397 (7th Cir. 1985), *cert. den. sub nom. Belletire v. Parks,* 473 U.S. 906 (1985); and *Gary A. v. New Trier High School Dist. # 203,* 796 F.2d 940 (7th Cir. 1986), cited by petitioner (Pet, pp 17-19). Here, there is no specific state policy which is at issue as there were in the cases upon which petitioner relies.

Petitioner never attacked the Commissioner's standards for approving private schools to assure that they meet state educational standards, as well as the requirements of the EHA. Petitioner failed to allege or demonstrate that New York State's system of granting approval to private schools, so that they may be considered as appropriate placements pursuant to the EHA, violates the EHA's requirement that the State "has in effect a policy that assures all handicapped children the right to a free appropriate public education". 20 U.S.C. § 1412(1).

Here, the Second Circuit only held that in the circumstances of this case, the COH, the local hearing officer, and the district court exceeded their authority to order Jane's placement at Hedges Treatment Center which was not an approved school during the time in question. The Second Circuit noted that Hedges Treatment Center had been closed to new admissions in 1985 because (1) Hedges

was not licensed as a school even in Pennsylvania, as New York required for approval, but was only a certified psychiatric hospital, (2) seclusion rooms were allegedly used there and New York was required to carefully investigate their use, and (3) New York was concerned about a school policy that would allow students at least 14 years of age to sign themselves out of treatment. Subsequently, these problems were resolved and admissions to Hedges were reopened, but only for children 14 and older. In addition, Devereaux Day School where Jane received her education while institutionalized at Hedges had never even applied to New York for approval.

The Second Circuit properly held that a district court is not free to substitute its judgment concerning the appropriateness of private schools which are not on the Commissioner's approved list. Here, Judge Curtin ordered Jane's placement at Hedges and Devereaux even though he did not find that the State Education Department's determination concerning Hedges Treatment Center and Devereaux Day School was unreasonable or violative of the federal policy which mandates that states ensure that private schools meet state educational standards as well as the requirements of the EHA.

Significantly, petitioner never challenged the approval process that exists in New York State for private schools and should not be permitted to make an attack on that system before this Court. Since the approval process was not at issue, the implications of this case are quite limited. Thus, while a district court has authority and a responsibility to determine whether a child is afforded an IEP that provides a free appropriate education and related services, it cannot ignore the statutory scheme in which the State educational agency, in conjunction with local authorities, generally directs the educational system. The

Second Circuit's decision recognizes that focusing on one individual's problems cannot obscure the institutional systems that must necessarily be in place for children to be educated in accordance with state educational standards, as well as the requirements of the EHA.

C.

Petitioner's contention (Pet, pp 20-22) that the Second Circuit improperly disregarded unrefuted contentions that the State Education Department violated petitioner's procedural rights is totally without merit. The Second Circuit did not hold that a parent of a handicapped child has no right to litigate the alleged denial of due process and/or procedural rights under the EHA if the issue occurs in the context of a COH's recommendation to place a child at a private school. Once again, petitioner's allegation of conflict with this Court's decision in *Board of Education v. Rowley,* 458 U.S. 176 (1982), is based upon a misstatement of the facts and the holding in the court below.

While petitioner's complaint had alleged that the Commissioner's practices regarding private school placements violated the EHA, once the district court rejected petitioner's initial claims and required petitioner to exhaust administrative remedies, those claims were not pursued. Thereafter, the focus of the litigation was on whether Jane Doe was entitled, at public expense, to be placed at Hedges Treatment Center and the Devereaux Day School pursuant to the EHA. Accordingly, the district court never addressed petitioner's broad based attack on the New York State Plan.

On appeal before the Second Circuit, both petitioner and the amicus *curiae,* the Western New York Disability Law Coalition, attempted to launch a broad attack on the

New York State Plan relating to the Commissioner's procedures relating to private school placements. The Commissioner objected, asserting that the issues were not developed below and should not be addressed by the Second Circuit. Even though he contended the issues were not properly raised, the Commissioner nonetheless refuted petitioner's baseless allegations that the Commissioner's procedures relating to private school placements violate the EHA.

The Commissioner noted that the EHA clearly authorizes the state educational agency to monitor private placements pursuant to 20 U.S.C. 1401(18), 1412(6), 1413(a)(4)(3). He rejected petitioner's assertion that there should be distinct due process procedures applicable to actions by regional associates of the State Education Department, noting that the New York State Plan and review procedures had been approved by the federal government and upheld in circumstances similar to this case in *Riley v. Ambach,* 668 F.2d 635 (2d Cir. 1981).

The Second Circuit found it unnecessary to address this broad procedural attack in light of its disposition of the appeal. Petitioner's assertion that the Second Circuit's determination not to address a claim establishes a broad precedent which undermines the procedures mandated by the EHA in conflict with this court's decision in *Rowley,* is without merit.

Conclusion

For these reasons, the Commissioner respectfully requests that petitioner's request for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit be denied.

Dated: Albany, New York
September 2, 1988

Respectfully submitted,

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